(2)

No. 90-1020

In The Supreme Court of the United States

October Term, 1990

COUNTY OF WAYNE, MICHIGAN,
Petitioner,

v.

LINDA HARTLEY RUSHING,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Should Certiorari be granted where the Petitioner, County of Wayne, is alleging, for the first time in this Court, that it properly implemented jail policies (including a judicially-mandated order), although Petitioner had previously consistently maintained, during all proceedings below, that Petitioner did not establish or implement any jail policies and had no obligation to do so?

   a.) Should the failure of Petitioner to claim heretofore any responsibility for establishing or implementing jail policies be viewed as positive evidence of the Petitioner's failure to establish and implement constitutional jail policies?

   b.) Must this court ignore, as Petitioner has, an appellate determination that the judicially-mandated court orders for the Wayne County Jail were not complied with, and accept Petitioner's belated assertion, in the absence of proof, that it scrupulously observed all court orders?

QUESTIONS PRESENTED FOR REVIEW — Continued

2. Is this the proper case for this court to explore the contours of the right of privacy since Petitioner never argued this issue previously and conceded the existence of this right through its failure to object to jury instructions on this issue and through arguments?

   a.) Based on the facts of this case, was a sufficient showing made to establish a violation of Respondent's constitutional right of privacy?

   b.) Would the granting of Certiorari be an exercise in futility since an adequate and independent basis for the Michigan Supreme Court opinion exists which is unchallenged by Petitioner?

3. Did the Michigan Supreme Court remain faithful to existing precedent which allows governmental liability under 42 U.S.C. § 1983 for customs although the written policies are constitutional?

LIST OF PARTIES

Petitioner is the County of Wayne, Michigan.

Respondent is Linda Hartley Rushing.

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Respondent, Linda Hartley Rushing, respectfully requests this Court to deny the Petition for a Writ of Certiorari to review the judgment and opinion of the Michigan Supreme Court entered in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported as *Rushing* v *County of Wayne*, 436 Mich 247, 462 NW2d 23 (1990). The Michigan Court of Appeal's opinion is reported at 138 Mich App 121, 358 NW2d 904 (1984).

STATEMENT OF THE CASE

The Petitioner has misstated the total thrust of this case. This case does not concern the disrobing of a suicidal pretrial detainee, but the aftermath: the four (4) days she remained in an open cell unclothed, continually leered at by a mail janitor. The four (4) days she was left naked without any psychiatrist, psychologist, social worker or any professional reviewing her case: denied medication, made to feel like an animal in a zoo, as a group of students were paraded in front of her.

A succinct recitation of facts would include the following: In June of 1976, the Respondent was arrested on a charge that was eventually dismissed at the time of the preliminary examination (Vol. XI, 8). Ms. Rushing entered the Wayne County Jail on Tuesday, June 8, 1976 (Exhibit 3). Her sister,

delivered Dilantin medication which was prescribed for Respondent's epilepsy (Vol. III, 114-115).

A jail social investigator, based on a phone call from a person claiming to be a sister of the Plaintiff, indicating that the Plaintiff had threatened suicide, prepared a document called a "PJ-210" which was received into evidence as Exhibit #3 (Vol. X, 84-86; Vol. XIX, 85). The "PJ-210," stated that Linda Hartley Rushing was "not psychotic, very depressed, frightened and threatened suicide." The PJ-210 further indicated that she should be seen again tomorrow. Based on this report, You Kim, a jail psychologist, ordered that Linda Hartley Rushing be stripped. The Plaintiff was classified as "suicide acute temporary" or "4T".

A person classified "suicide acute temporary," pursuant to the jail manual (Exhibit 4) was supposed to be *reviewed daily by a psychologist* (Vol. VIII, 92, 135). Furthermore, a psychiatrist was obligated, pursuant to the manual, to *personally review the case* (Vol. VIII, 92, 135). Despite this rule, whether a psychiatrist visited with the patient was solely up to the discretion of the psychiatrist, who had sole authority

to determine the quality and extent of the care an inmate received (Vol. VIII, 134, 139, 141).

At this time, the Wayne County Jail was subject to a Court Order which required the jail staff to remove clothing from an inmate who exhibited suicidal tendencies. The Order further provided that when clothing is removed, "the advice of persons with psychiatric training must be promptly sought respecting the return of some or all such articles and implements." (Plaintiff's Exhibits 7, Petitioner's Appendix A-121)

The Plaintiff admittedly was *not* seen by Mr. Kim during the rest of her stay at the Wayne County Jail (Vol. IX, 142-143). In response to a question as to why he did not spend at least ten (10) minutes a day with Linda during her stay at the Wayne County Jail, You Kim testified that every Thursday he had a staff meeting and that the psychiatric social workers, who were assigned, could handle the problem without getting the psychologist or psychiatrist involved (Vol. X, 29-30). Dr. Kim further stated that it did not take a lot of training to detect a psychotic episode. He opined that any layman could detect a

a psychotic episode (Vol. X, 20). Linda Rushing testified, contrary to the Defendant You Kim, that she did not see any other social workers or psychologists while she was at the jail (Vol. XI, 50). There were no records of the psychiatrist, Dr. LeBedevitch, seeing the Plaintiff, although he generally kept records (Vol. IX, 38). The Plaintiff's Dilantin medication was not given to her on three (3) of the four (4) days that she was present in the jail (Vol. XI, 48-49). A blanket given to the Plaintiff by another inmate, was taken away by a deputy (Vol. XI, 44). During this time, the Respondent's mother also attempted unsuccessfully to get treatment for her (Vol. V, 18).

While Ms. Rushing was unclothed, a janitor, at least once or twice a day while in front of her cell, would lean on his broom and stare at the undressed Plaintiff (Vol. X, 56). Also, on one occasion, while Ms. Rushing was sitting on the commode, he started whistling at her (Vol. X, 54, 55). This incident caused Ms. Rushing to feel very dirty and cheap (Vol. X, 56). Indeed, while in the cell following these occasions, Linda began to hallucinate that she was seeing her deceased

grandmother (Vol. V, 100; Vol XI, 50). In addition, she heard other non-existent voices calling out to her (Vol. XI, 81).

On the day that the Plaintiff was released from the jail, a tour of medical students was conducted within the women's ward, which housed the Plaintiff (Vol. V, 108-109, Vol. XI, 52-53). Approximately ten (10) to twelve (12) men, who were dressed in suits, "inspected" the Plaintiff and the cell while she was unclothed (Vol. XI, 52-54).

At the trial, expert testimony was presented as to the cruelty of what occurred: Since the inmates who were allegedly suicidal were already suffering from psychological personality disorders, it was unnecessarily cruel to increase their misery by exposing them to members of the opposite sex. This could only hurt their condition (Vol. XIII, 28). Additionally, the simple expedient of paper gowns was suggested if males had to be in the vicinity. (Vol. XV, 59).

Mr. Wilkerson, the Jail Administrator, set policies for the Wayne County Jail (Vol. XVI, 24). Wilkerson did not know whether male janitors were on the fourth (4th) floor area where naked, potentially suicidal women were housed (Vol. XVI,

50-53). Mr. Wilkerson noted that it was possible for men to be on the fourth (4th) floor where ladies were naked (Vol. XVI, 44). There was no policy which prohibited this practice (Vol. XVI, 45). For instance, Wilkerson said if there were a shortage of female personnel, male maintenance persons still had to get the job done regardless of whether naked ladies were housed in the area (Vol. XVI, 47-48). Consistent with this reasoning, there was no prohibition against people who sold cigarettes and sundry items from being in the area where unclothed women were housed (Vol. XVI, 51). Mr. Wilkerson did not recall ever having written any policy prohibiting the exposure of naked inmates; and no specific policy existed prohibiting classes of students, custodians, or cigarette sellers from being in this area (Vol. XVI, 73-74). The psychiatrist was given complete discretion to treat inmates (Vol. XVI, 101-104). Paper gowns were not used to shield inmates. (id)

The effect of this gross invasion of personal privacy and denial of psychiatric attention on Linda Hartley Rushing, during her jailing, was almost immediate. Ms. Rushing felt as

though she was an animal in a zoo and was dirty and cheap (Vol. XII, 70). Her reaction was very acute because of her great modesty as a child. She did not like to shower in the presence of others, even after her gym class (Vol XII, 63). She indicated that after the jail incident she was completely unable to cope with her problems (Vol. XII, 73). Her family confirmed that after the incident she became afraid to go out in public with people and became "like a vegetable" (Vol. XII, 100-101).

A treating psychiatrist testified that the Plaintiff's most sensitive area, her dignity and self-esteem were torn away by the jail incident and it became the precipitating cause for her feelings of utter humiliation, degradation and unworthiness (Vol. VI, 52, 55-56). The Respondent's condition was diagnosed as being a chronic psychotic depressive reaction (Vol. VI, 62). That is, she lost her ability to test reality, a form of nervous breakdown (Vol. VI, 62, 65). He believed that Ms. Rushing would have to undergo extensive medication for her condition (Vol. VI, 91). Antipsychotic medication was

necessary for Ms. Rushing given her delusions and hallucinations (Vol. VI, 91, 99, 101).

This is not the type of case where resort to "second guessing" is necessary. The nature of harm demonstrates a pattern of pervasive and systematic neglect amounting to deliberate indifference. Every time procedures were allegedly in place to provide care, there was sheer unmitigated failure. Linda Rushing was a pre-trial detainee known to be suffering from acute mental distress and diabetes. The Jail Reception and Diagnostic Center was ostensibly established to screen and determine special psychiatric and medical needs (Vol. VIII, 54). However, Linda was not processed through the Center (Vol. VIII, 53). Nor was this failure to process deemed unusual or a one time incident (Vol. VIII, 54).

Special cells and precautions were supposedly instituted to protect against the real threat of suicide for these persons, whose clothing was removed. However, in front of this acutely distressed, undressed modest woman, with no refuge, males were allowed to visually rape her (Vol. X, 54-55). Again, nothing unusual (Vol. XVI, 44, 50-53, 73-74).

Medical care and psychiatric care were supposedly present to treat illness (Vol. VIII, 92, Exhibit 4). However, except for one visit by a psychologist, who commanded her disrobing, there were no health care professionals who treated, *or even visited*, this acutely susceptible distressed woman (Vol. IX, 38; Vol. VIII, 136). Again, nothing unusual, nothing was amiss according to the Defendant (Vol. X, 29-30, 131; Vol. VIII, 141). The psychological staff had no overseer (Vol. VIII, 139). Prescribed medication was supposedly to be given to inmates. However, it was not, and it was pointed out, sometimes it is not returned for a period of seven (7) days. Both Frank Wilkerson and Carl Rector, two (2) high jail supervisory officials, indicated that the psychologist and psychiatrist had free rein to ignore detainees who were in need of prescribed medication and acutely psychiatrically ill (Vol. VIII, 139, Vol. XVI, 101, 103-104).

If unable to take care of Linda Rushing, she could have been sent to a hospital for care; the jail staff had that authority without a probate court order (Vol. XVI, 113). This was, of course, not done. Ms. Rushing's condition was much worse

following her incarceration (Vol. V, 104-113, Vol. VI, 92-93). Consequently, the wrongs, the constitutional torts, can be, and should be, attributed to the most culpable party, the defendant who itself caused the violations through its own policies, customs and pervasive neglect: the County of Wayne. The factual recitation of the Michigan Supreme Court is also incorporated herein.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER IS ASSERTING FOR THE FIRST TIME IN THIS COURT THAT IT ESTABLISHED AND IMPLEMENTED POLICIES FOR THE WAYNE COUNTY JAIL.

Petitioner is not claiming the original jurisdiction of this Court. Nevertheless, following fourteen (14) years of litigation, the Petitioner has conjured up an entirely different defense: that it established and implemented policies for the Wayne County Jail.

At trial, the position was maintained that the Petitioner was not involved in setting or implementing jail policies. The arguments of Petitioner's counsel during the successful

directed verdict motion demonstrate a completely opposite position to their present posture:

> "We have seen copious evidence in this court, Your Honor, that all the policies with regard to the way that the, alleged way that Linda Hartley Rushing was treated *were not in fact the policies of Wayne County despite the attempt of Plaintiff's Counsel on numerous occasions to get everybody to admit or attempt to get everybody to admit that these were policies of Wayne County.*
>
> There has been absolutely not one iota of evidence in this case that any of the policies arising out of which Linda Hartley Rushing was stripped, subjected allegedly to view by other people.
>
> The question of withholding medication and the question of either Mr. You Kim or Milas Lebedevitch seeing or not seeing her were policies of the County. As a matter of fact, it's been stated on numerous occasions that *these were policies of the Sheriff, a party that is not in this lawsuit. Absolutely not in this lawsuit.*
>
> *On this basis we believe that the County is improperly in this case under alleged civil right violations."* Petitioner's Appendix A-83, A-84 (emphasis added)

Later at trial, this same argument was reiterated as to the judicially-mandated orders that Petitioner has placed great—though belated—reliance on:

> "Secondly, *the County didn't implement the orders of the Circuit Court; the Wayne County Sheriff did.*
>
> *The County did what it was supposed to, it provided a building free from defects.* Plaintiffs have put absolutely no evidence in with regard to defect of a

> building save a minor toilet problem in that jail cell that Linda Rushing was in and in that instance there was absolutely no indication that that made the place uninhabitable or, in fact, Linda Hartley Rushing claimed to be injured or, in fact, was injured as a result of a leaking toilet." Petitioner's Appendix A-91

These arguments, while not hardy enough to survive to this Court, apparently found a sympathetic ear with the trial court as the following jury instruction of the Petitioner was given:

> "The County of Wayne is not charged with the administration of the County Jail, *nor does it implement nor execute policies therein*. Such authority resides with the Sheriff, a constitutional officer." (Vol. XX, 188)

On appeal to the Michigan Court of Appeals, the Petitioner persisted in claiming it had no responsibility to set policies and did not establish or implement any policies:

> "Based upon the evidence and the laws of this State, the *Court rightly ruled that the County has no obligation to the Plaintiff excepting the question of building defect* (Vol. 19, pg. 82).
>
> Appellant cites, in his Brief to this Court, a great number of cases, most of which are irrelevant, except to the extent that a close examination of same will demonstrate that *the government entity in those cases was the proper party to be sued*. That is so because the various state laws in the jurisdictions in which the litigation arose *gave those defendants in question the power to act (custom or policy)*." (Appellees' Brief On Appeal, p. 16) (emphasis added)

Again, in the Michigan Supreme Court responsibility was disclaimed:

> "Whatever policies, good or bad, legal or illegal that might be involved in this case, are not imputable to Wayne County's governing body. It has no authority to fix or set policy under *Monell*, thus, there is no liability." (Appellees' Supplemental Brief On Appeal, p. 10)

The Michigan Supreme Court specifically rejected this argument in the course of its opinion. (Petitioner's Appendix A-16, A-28)

Of course, the failure of the Petitioner to properly present an issue with fair precision and in due time to the highest state court precludes review by this Court. See e.g., *Street v New York*, 394 U.S. 576, 89 S.Ct. 1354 (1969); *Pickering v Board of Ed. of Township High School Dist.*, 205, 391 U.S. 563, 88 S.Ct. 1731 (1968). The Petitioner is also not entitled to assert an inconsistent position. *New York, L.E. & W.R. Co. v Estill*, 147 U.S. 591, 13 S.Ct. 444 (1893).

a.) The Failure of Petitioner to Recognize Any Responsibility to Establish or Implement Policy Constitutes Positive Evidence as to the Inadequacy of that Policy.

This argument needs no elaboration. How could the Petitioner's policies have passed constitutional muster when it doggedly fought any suggestion it had any obligation to make policies? This is essentially the position of the Michigan Supreme Court.

b.) The Petitioner's Belated Reliance on Judicially-Mandated Orders as Establishing Policies for the Jail is Belied by the Absence of Any Proof of Compliance and the Necessity of the Michigan Court of Appeals to Appoint a Receiver for the Jail.

At trial, there was *no* evidence presented by the Petitioner that the Court ordered suicide plan was complied with. Although it was suggested that Circuit Court Judge John O'Hair, one of the three Judges involved in that case, would testify; he never was called. (Vol. XVII, 149; Vol. XVIII, 7) This was no hint of any evidence of this nature. The Court Order referred to and attached by the Petitioner to its appendix (A-116-126) was, in fact, introduced by Respondent. (Exhibits 7, 8) The issue at trial concerned what happened after Respondent was disrobed — not the fact of disrobing. The only evidence at trial indicated that written orders and regulations *were totally ignored.* For instance, according to the

Deputy Director of the Reception Center, a person classified "suicide acute temporary," pursuant to the jail manual (Exhibit 4), was supposed to be *reviewed daily by a psychologist* (Vol. VIII, 92, 135). Furthermore, a psychiatrist was obligated, pursuant to the manual, to *personally review the case* (Vol. VIII, 92, 135). Regardless of this rule contained within Exhibit 4, which was entitled "Sheriff, Wayne County Jail, Training Manual" (Vol. VIII, 83), the Deputy Director testified that whether a psychiatrist visited with the inmate-patient was *solely* up to the discretion of the psychiatrist, who had sole authority to determine the quality and extent of the care an inmate receives (Vol. VIII, 139). Consequently, the Deputy Director, contrary to the training manual (Exhibit 4), did not agree that a psychiatrist must see or that a psychologist should daily review the "acutely suicidal" inmate (Vol. VIII, 141; Vol. IX, 134) *id.* In this case, Linda Rushing was abandoned by the mental health staff. (supra)

Significantly, the Petitioner in its "STATEMENT" in support of its Petition informs this Court as to the convening of a three (3) Judge panel to superintend control of the Jail in

Wayne County Jail Inmates, et al v Lucas, 391 Mich 359, 216 NW2d 910 (1974). While the beginning of the story is told: "The Court ordered that judicial supervision of the jail begin to make the jail 'suitable and sufficient' for inmates" (Petitioner's Writ p. 2); the rest of the story is not. Part of that can be read in *Wayne County Jail Inmates v Wayne County Chief Executive Officer*, 178 Mich App 634, 444 NW2d 549, 559 (1989), which involved continuation of the same litigation. The findings in Part II of this eighteen (18) year saga reflect the same type of long term, callous, systemic failures, amounting to deliberate indifference, as present in the instant case:

> "Psychiatric prisoners are housed under conditions which are counter-therapeutic and degrading.
>
> • • •
>
> Insufficient supplies exist to provide a replacement for prisoners while the gowns are being washed. Consequently the monitors and their consultant observed, even on their follow-up inspection in the fall of 1988, several inmates were left naked in their cells during the gown-washing cycle.
>
> Screening is wholly inadequate. Many inmates are placed in psychiatric wards with no screening at all. Evaluation is often undocumented, and care plans are virtually nonexistent. The psychiatrist sees acute

patients on a follow-up basis every six weeks and nonacute patients every twelve weeks. Many charts reflect no follow-up whatsoever. Staff psychologists perform follow-up evaluations roughly once per month. This level of care falls short of the community "free standard" required under the final judgment.

Policies and procedures for psychiatric services are virtually nonexistent. There is no in-service training. Supervision is minimal, and there are no quality control mechanisms.

• • •

No purpose would be served by prolonged, detailed recitation of the medical care deficiencies in the jail. Again, a serious attempt at providing medical care consistent with the community "free standard" of the final judgment is not present, both as to staffing levels and staffing supervision. The medical director does not train the staff or evaluate them. Meetings with other jail physicians are rare. Medical histories are not thorough, and records are so badly organized they are virtually unavailable."

Certainly, the assertion that the Petitioner did not deviate from the judicially-mandated requirements is false: a receiver was, of necessity, appointed to oversee the Wayne County Jail. The Petitioner will have an opportunity to present evidence as to its policies and compliance with the suicide prevention plan at the retrial of this matter — if it does not revert to its former argument.

II. THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED RIGHT OF PRIVACY WAS NEVER CHALLENGED IN THIS CASE.

Although the Petitioner now opines that there were no constitutional violations, based on privacy concerns, arising out of the repeated unexplained viewing of an unclothed Ms. Rushing by a janitor, students and guards, prior to this Petition no such trepidations were expressed. The Michigan Supreme Court opinion alludes twice to the Petitioner's failure to dispute the constitutional right to privacy. (Petitioner's Appendix A-22-23 f.n. 4; A-24 f.n. 6) By the same token, the Petitioner never indicated that the law in this area was unsettled. Nor was there any evidence from Petitioner as to any reason or justification why males were allowed to continuously view the unclothed Respondent. For instance, there was no showing that a female janitor or female guards were not available, or that suicide gowns could not be used.

a.) A Violation of Constitutional Rights Occurred Through the Invasion of the Plaintiff's Privacy.

There should be little dispute but that the sanctioned, continuous viewing of Linda Rushing's naked body by male jail employees who (1) helped disrobe her; (2) cleaned the floors; and (3) were escorting a group of male students constituted an invasion of Linda Rushing's constitutional right of privacy. The leading case, which has recognized this proposition is *York vs. Story,* 324 F2d 450, 455 (9th Cir. 1963):

> Nor can we imagine a more arbitrary police intrusion upon the security of that privacy than for a male police officer to unnecessarily photograph the nude body of a female citizen who has made complaint of an assault upon her, over her protest that the photographs would show no injuries, and at a time when a female police officer could have been, but was not, called in for this purpose, and to distribute these photographs to other personnel of the police department despite the fact that such distribution of the photographs could not have aided in apprehending the person who perpetrated the assault.

The privacy rights of an inmate were held to be superior to the employee's rights for equal job opportunities:

> In none of these cases, however, did the courts find the employees' interest in equal opportunities sufficiently compelling so as to override the inmates' privacy rights. Therefore, the Court must find that the plaintiff's rights were violated by the assignment of

female guards to posts where they could view him while he was completely or entirely unclothed.
Hudson vs. Goodlander, 494 F.Supp. 890, 893 (D. Md. 1980).

b.) An Additional, Adequate, Basis for Supporting the Michigan Supreme Court's Opinion Exists.

The concurring Opinion of Justice Boyle of the Michigan Supreme Court, which specifically was not rejected by the lead opinion, was based on the failure to provide mental health care and medication to the Respondent during her four (4) day stay. It is noteworthy that this independent basis of liability, including the federal authority relied upon by Justice Boyle, remains unchallenged by the Petitioner before this Court.

III. THE MICHIGAN SUPREME COURT REMAINED FAITHFUL TO EXISTING PRECEDENT WHICH ALLOWS GOVERNMENTAL LIABILITY UNDER 42 U.S.C. § 1983 FOR CUSTOMS ALTHOUGH THE WRITTEN POLICIES ARE CONSTITUTIONAL.

Following an exhaustive review of legislative history, this Court in *Monell v New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d. 611 (1978), ruled that municipalities could be held liable where the governmental

unit itself was responsible for the constitutional violation at issue. Liability was not restricted to "officially adopted and promulgated" policies or orders:

> [L]ocal governments, like every other S1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613 26 L.Ed.2d 142 (1970); "Congress included customs and usages [in S1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law. 43 US at 691, 98 S.Ct. at 2036.

Further elaboration was provided by the *Monell* Court in footnote 56, which relied on a previous opinion of Justice Frankfurter:

> See also Mr. Justice Frankfurter's statement for the Court in *Nashville, C. & St. L. R. Co. v Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940):
>
> > "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and *to disregard the gloss which life has written upon it.* Settled state practice . . . can establish

> what is state law. The Equal Protection Clause did not writ an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text." (Emphasis added).

In this case, what was written was "daily review" by a psychologist and "personal review" by a psychiatrist. The "gloss which life has written upon it" was *no* daily or personal review: no care. It was this framework that the Michigan Supreme Court used.

The question remained, however, as to whether or not liability would rest with a governmental unit which had an admittedly constitutional policies and customs, if those policies were not executed in the field. That is precisely the question which is presented in this case, and precisely, the question presented in *City of Canton v Harris,* 489 US 378, 109 S.Ct. 1197 (1989). The Michigan Supreme Court's application of *Harris*, in the lead opinion, to this case is easily supportable based on unwritten policies.

> By analogy to *Harris*, if a city may be said to have a policy for which it may be held liable if it fails to train employees adequately, then the outright failure to formulate any policy (which might in turn require

> instruction to be properly implemented) in the face of an obvious need to do so may also suffice to create liability. Otherwise, a municipality could avoid liability by simply ignoring an obvious need. This, however, was clearly not the Court's intention in *Harris*. The very notion of deliberate *indifference* contemplates a *failure* to act when the need to do so is obvious. (Petitioner's Appendix A-23)

The concurrence of Justice Boyle took a similar position with regard to *Harris*, although based on an Eighth Amendment (U.S. Const. Amend. VIII) grounds of denial of psychiatric care:

> A factfinder could reasonably conclude that a suicidal woman who is stripped nude except for underpants and placed in a jail cell has a serious medical need for continued psychiatric review and monitoring.
>
> Moreover, there is evidence from which a jury could conclude that the policy of granting total discretion to the psychiatric staff with regard to the treatment of stripped and suicidal patients represents deliberate indifference on the part of the Jail Administrator. As previously noted, having reviewed and approved jail procedures calling for a daily review by a psychiatrist of persons classified as potentially acutely suicidal, the administrator was aware of the need for such review, for purposes of monitoring as well as possible reclassification. The policy, whether it is characterized as one of nonenforcement of written procedures, of nonsupervision of psychiatric personnel, or of complete delegation of discretion to psychiatric personnel, under the circumstances may be found to be a policy of deliberate indifference. (Petitioner's Appendix A-36)

In contradiction to this lucid analysis, the dissenting opinion below appears to require almost specific intent. Certainly, a viewpoint inconsistent with this Court's holdings. Likewise, the Michigan Court of Appeal's Opinion requires enunciated unconstitutional policies. Adoption of these rulings is not in harmony with *Monell* or *Harris*.

CONCLUSION

The Writ of Certiorari should be denied.

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